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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|-----------------|-------------|----------------------|---------------------|------------------|
| 09/890,434      | 01/27/2003  | Rene Gschwind        | DT-4080             | 1633             |

7590 07/26/2005

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| EXAMINER |
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KUHNS, SARAH LOUISE

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| ART UNIT | PAPER NUMBER |
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1761

DATE MAILED: 07/26/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

09/890,434

Applicant(s)

GSCHWIND, RENE

Examiner

Sarah L. Kuhns

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 27 January 2003.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-23 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,2 and 12-23 is/are rejected.
- 7) ☒ Claim(s) 3-11 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |   |   |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)  | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## DETAILED ACTION

### *Claim Objections*

Claims 3-11 are objected to under 37 CFR 1.75(c) as being in improper form because a multiple dependent claim may not depend on more than one claim unless in the alternative and may not depend on another multiple dependent claim. See MPEP § 608.01(n). Accordingly, claims 3-11 not been further treated on the merits. It is believed that Applicant meant to cancel these claims in submitting the preliminary amendment. However, in order to do so an amendment listing claims 3-11 as "canceled" needs to be submitted.

Applicant is reminded to use proper Markush language and it is suggested that claim 1 be modified to read "comprising" and "containing at least."

Claim 2 is objected to under 37 CFR 1.75(c), as being of improper dependent form for failing to further limit the subject matter of a previous claim. Applicant is required to cancel the claim(s), or amend the claim(s) to place the claim(s) in proper dependent form, or rewrite the claim(s) in independent form. There is no beverage that is not "an alcoholic beverage or a non-alcoholic beverage" and the use of "preferably" makes the limitations that follow optional.

Claim 3 is objected to because it fails to further limit the sugar because the use of "preferably" makes the limitation of trehalose optional. Also, it is believed that the second line should read "or the sweetening agent" instead of "and the sweetening agent" as only one or other is required by the independent claim.

***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 19 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claim 19 recites the limitation "fruit mixture" in line 1. There is insufficient antecedent basis for this limitation in the claim.

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 2, 18, 20, and 21 are rejected under 35 U.S.C. 102(b) as being anticipated by Sakuma, JP 60120950 A. The Examiner is relying upon an oral translation in making this rejection. A full translation has been requested and will be forwarded to Applicant when received.

In regard to claim 1, Sakuma discloses a spread comprising one beverage, sugar, a thickening agent, an acidification agent, and a cola aroma.

In regard to claim 2, Sakuma discloses the beverage being milk, cola, fruit juice, or vegetable juice.

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In regard to claim 18, Sakuma discloses the spread comprising citric acid.

In regard to claims 20 and 21, Sakuma discloses the spread comprising a cola beverage, which inherently contains caramel syrup/aroma and caffeine.

Claims 1, 2, 15, 16, 18, 20, and 21 are rejected under 35 U.S.C. 102(a) as being anticipated by Altwater, DE 19736429 A1. The Examiner is relying upon an oral translation in making this rejection. A full translation has been requested and will be forwarded to Applicant when received.

In regard to claim 1, Altwater discloses a spread comprising one beverage, sugar, a thickening agent, an acidification agent, and a cola aroma.

In regard to claim 2, Altwater discloses the beverage cola or fruit juice.

In regard to claim 15, Altwater discloses the cola beverage containing saccharin or acesulfam potassium.

In regard to claim 16, Altwater discloses the thickening agent being pectin.

In regard to claim 18, Altwater discloses the spread comprising citric acid, lactic acid, or tartaric acid.

In regard to claims 20 and 21, Altwater discloses the spread comprising a cola beverage, which inherently contains caramel syrup/aroma and caffeine.

Claims 1, 2, 16, 20, and 21 are rejected under 35 U.S.C. 102(b) as being anticipated by Ono et al., U.S. Patent 4,197,325.

In regard to claim 1, Ono discloses a spread comprising one beverage, sugar, a thickening agent, an acidification agent, and a cola aroma (claim 1).

In regard to claim 2, Ono discloses the beverage being milk, cola, fruit juice, or vegetable juice (claim 1).

In regard to claim 16, Ono discloses the thickening agent being gelatin (claim 1).

In regard to claims 20 and 21, Ono discloses the spread comprising a cola beverage (claim 1), which inherently contains caramel syrup/aroma and caffeine.

Claims 1, 2, 16, 18, 20, and 21 are rejected under 35 U.S.C. 102(b) as being anticipated by Fukuyama, et al., EP 0496426 A1.

In regard to claim 1, Fukuyama discloses a spread comprising one beverage, sugar, a thickening agent, an acidification agent, and a cola aroma (page 2, lines 48-55).

In regard to claim 2, Fukuyama discloses the beverage being milk, cola, or fruit juice (page 2, lines 53-55).

In regard to claim 16, Fukuyama discloses the thickening agent being pectin or gelatin (page 2, lines 50-52).

In regard to claim 18, Fukuyama discloses the spread comprising citric acid (see chart on page 5).

In regard to claims 20 and 21, Fukuyama discloses the spread comprising a cola beverage (page 2, lines 48-55), which inherently contains caramel syrup/aroma and caffeine.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 17, 19, 22, and 23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Sakuma, Altwater, Ono, and Fukuyama, as applied above, in view of Brinkers, U.S. Patent 5,223,300, and Heine et al., U.S. Patent 3,600,196. The ingredients claimed by Applicant were well known to one of ordinary skill in the art as discussed above. Sakuma, Altwater, Ono, and Fukuyama all disclose the use of a cola beverage in a spread, which inherently contains water, sugar, caramel syrup, citric acid, cola aroma, and caramel aroma. Altwater further discloses the use of diet cola beverages containing aspartame and Sakuma discloses the inclusion of a starch syrup, a sauce material made from fruit, and thick malt syrup. Additionally, Brinkers discloses

the use of carob bean flour as a thickener in a spread (example C) and Heine discloses the inclusion of nougat in a spread as a source of fat (column 2, lines 15-25).

Attention is directed to *In re Levin*, 84 USPQ 232, which states: New recipes of formulas for cooking food, which involve addition or elimination of common ingredients, or for treating them in ways which differ from former practice, do not amount to invention merely because it is not disclosed that no one else ever did what Applicant did; Applicant must establish co action or cooperative relationship between ingredients which produces new, unexpected and useful function.

As all of the ingredients used in the spread claimed by Applicant were well known in the art of spreads, and no unexpected result has been provided, it would have been obvious to alter the amounts and specific combination in order to achieve a spread with a desired taste or texture.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Sarah L. Kuhns whose telephone number is 571-272-1088. The examiner can normally be reached on Monday - Friday from 8:00 am - 4:30 pm.


If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached at 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.



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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

SLK

  
**MILTON I. CANO**  
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